

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NATASHA PFAFF,

Plaintiff

Case No. 07-5280RJB

v.

ORDER

STATE OF WASHINGTON, DEPARTMENT
OF SOCIAL AND HEALTH SERVICES, et
al.,

Defendants.

LEYA REKHTER, et.al.,

Plaintiffs

v.

STATE OF WASHINGTON, DEPARTMENT
OF SOCIAL AND HEALTH SERVICES, et
al.,

Defendants.

This matter comes before the Court on five motions: (1) Plaintiff Pfaff's Motion for Appointment of Interim Counsel for Proposed Class of Medicaid Beneficiaries (Dkt. 37); (2) Plaintiff

ORDER- 1

1 Pfaff's Motion for Certification of the Class of Medicaid Beneficiaries (Dkt. 37-2); (3) Plaintiff
2 Rekhter's Motion for Appointment of Interim Class Counsel (Dkt. 41); (4) Plaintiff Rekhter's
3 Motion for Class Certification (Dkt. 45); and (5) Defendants' Motion to Strike Declaration of John
4 A. Strait (Dkt. 46). The Court has considered the motions and responses to motions, and the
5 remainder of the file herein.

6 PROCEDURAL HISTORY

7 On May 4, 2007, *Rekhter v. State of Washington, et al.* (hereafter *Rekhter*) was filed in
8 Thurston County Superior Court, cause number 07-2-00895-8. C07-5306RJB, Dkt. 1, Exh. A. On
9 June 20, 2007, the *Rekhter* case was removed to federal court. C07-5306RJB, Dkt. 1.

10 On May 8, 2007, *Pfaff v. Arnold-Williams*, (hereafter *Pfaff*) was filed in Thurston Count
11 Superior Court under cause number 07-2-00911-3. C07-5280, Dkt. 1, Exh. A. On May 18, 2007,
12 Ms. Pfaff filed a First Amended Complaint (Class Action). C07-5280RJB Dkt. 1, Exh. B. On June
13 6, 2007, the Pfaff case was removed to federal court. C07-5280RJB Dkt. 1, Exh. B.

14 A third case, *SEIU 775 v. Robin Arnold-Williams*, King County No. 07-2-17710-8SEA was
15 filed in King County Superior Court during May of 2007.

16 For the purposes of these motions, the court assumes the truth of defendants' account of the
17 context in which these cases arose. *See* Dkt. 6. The cases involve claims on behalf of a class of
18 recipients of personal care services (*Pfaff and Rekhter*) and providers of personal care services
19 (*Rekhter*) through four public assistance programs administered by defendant Washington State
20 Department of Social and Health Services (DSHS). The four programs are: (1) the Community
21 Options Program Entry System (COPES)(42 U.S.C. § 1396n(c) and RCW § 74.39A.030(2)); (2) the
22 Medicaid Personal Care (MPC) program (42 U.S.C. § 1396d(a)(24) and RCW 74.109.520(2)); (3)
23 the Medically Needy In-Home Waiver program (42 U.S.C. § 1396n(c), RCW 74.09.700(2)(a)(i) and
24 RCW 74.39.041(1)); and (4) the Chore Program (RCW 74.39A.220). While each program is
25 somewhat different, they all have both functional disability and financial eligibility standards that

1 recipients must meet in order to be eligible for benefits. The first three programs are Medicaid
2 programs for which the federal government reimburses slightly more than fifty percent of the state's
3 expenditures. The Chore Program is entirely state funded.

4 Under these programs, DSHS pays for eligible recipients to receive assistance with activities
5 of daily living such as bathing, dressing, eating, and toilet use. These services are designed to enable
6 the recipients to reside in their homes instead of in institutional settings. Recipients who are
7 developmentally disabled receive services through the DSHS Division of Developmental Disabilities,
8 and other disabled adults receive services through the DSHS Division of Aging. The methodology
9 of determining the level of personal assistance for which the recipient is eligible is the same for all
10 recipients.

11 The standard assessment process used by DSHS for determining both eligibility and the
12 number of hours of assistance that will be provided is known as the Comprehensive Assessment and
13 Reporting Evaluation (CARE) process. The CARE process is set forth in WAC 388-106-0080
14 through -0145. Prior to June 29, 2007, pursuant to former WAC 388-106-130(b)(3), recipients who
15 chose to have providers who lived with them received fifteen percent fewer hours of paid assistance
16 than those recipients whose providers were not part of the recipients' households. This was known
17 as the shared living rule.

18 On May 3, 2007, the Washington Supreme Court, in *Jenkins v. Washington State Dept. Of*
19 *Social and Health Services*, 160 Wn.2d 287 (2007) held that former WAC 388-106-0130(b)(3) (the
20 Shared Living rule) violated the requirement of 42 U.S.C. § 1396a(a)(10)(B)(i) that the "amount,
21 duration, and scope" of medical assistance available to one recipient of Medicaid services be
22 comparable to the "amount, duration and scope" of assistance available to other recipients. The
23 *Jenkins* opinion resolved three different administrative appeals of DSHS decisions determining the
24 number of hours that individual recipients were eligible for under the COPES and MPC programs.
25 DSHS filed a motion for reconsideration in *Jenkins*, seeking clarification as to whether the remand

1 was to the superior courts that heard the administrative appeals or to DSHS pursuant to RCW
2 34.05.574. That motion may be pending.

3 On the strength of the *Jenkins* ruling, the putative class members want this court to restore
4 the 15% funds lost due to the shared-living rule.

5 On August 17, 2007, this Court consolidated *Rekhter* and *Pfaff*, and ordered that future
6 documents be filed in the *Pfaff* case. C07-5280, Dkt. 26, at 8. The Court ordered the parties to file
7 an agreed case management plan. *Id.* In the event that the parties could not agree on such a plan,
8 the parties were provided with an option to file a motion for appointment of interim counsel. *Id.*
9 The parties could not agree on a proposed case management plan. *See* Dkt. 37 and 41.

10 DISCUSSION

11 **1. Class Certification**

12 On October 25, 2007, *Pfaff* filed a Motion for Certification of the Class of Medicaid
13 Beneficiaries, proposing the following class:

14 All past and current Washington State Medicaid beneficiaries whose personal care benefits
15 were reduced because they lived with their paid caregivers, pursuant to WAC 388-106-0130
and its predecessor regulations.

16 C07-5280RJB, Dkt. 37-2, at 5.

17 On July 26, 2007, *Rekhter* moved to certify a class under Fed R. Civ. P 23(b)(3). *See* C07-
18 5306RJB, Dkt. 5. On August 17, 2007, the court struck this motion, but the motion remained
19 pending. Dkt. 26. On October 29, 2007, this motion was renoted for November 9, 2007, and the
20 court ordered that the motion, originally filed in C07-5306RJB, be filed by the Clerk in C07-
21 5280RJB. *See* Dkt. 44. The motion for class certification is now filed as Dkt. 45 in C07-5280RJB.

22 In its motion for class certification, *Rekhter* proposes two class definitions: one for
23 beneficiaries and one for caregivers:

24 1. Wages/Compensation for Services Rendered (Care Providers). All care providers for
25 recipients receiving personal care benefits under Ch. WAC 388-106 who have had any of
their wages/compensation eliminated as a result of the application of the Shared Living Rule

1 since the agency rule became effective in August 2003.

2 2. Compensation for Back Benefits (Medically Ill Clients). All recipients receiving public
3 benefits classified under Ch. WAC 388-106 who have had any elimination of benefits as a
4 result of the application of the Shared Living Rule since the agency rule became effective in
5 August 2003.

6 Dkt. 45, at 2.

7 On November 5, 2007, Defendants filed a Response to Pfaff's Motion for Appointment of
8 Interim Counsel and to Rekhter's Motions for Appointment of Interim Class Counsel and Renewed
9 Motion for Class Certification. Dkt. 47. Defendants contend that (1) class certification is
10 appropriate under Fed. R. Civ. P. 23(b)(1) or (2), but not (3); (2) class certification is only
11 appropriate for the purposes of determining liability; (3) no conflict of interest exists between
12 caregivers and beneficiaries; and (4) the class definitions proposed by *Rekhter* and *Pfaff* are not
13 appropriate. Defendants recommend that two classes be formed with slightly different definitions
14 than those proposed by *Pfaff* and *Rekhter*, as follows:

15 1. All persons who (1) were determined eligible for Medicaid funded in-home personal care
16 assistance and (2) had their base hours adjusted downward by fifteen percent because of the
17 operation of Wash. Admin. Code § 388-106-130(b)(3) (or its predecessor), except to the
18 extent that they (3) requested an adjudicative proceeding pursuant to Wash. Rev. Code §
19 74.08.080 challenging the downward adjustment and have received or will receive back
20 benefits as a result.

21 2. All providers of Medicaid-funded in-home personal care employed by persons who (1)
22 were determined eligible for Medicaid funded in-home personal care assistance and (2) had
23 their base hours adjusted downward by fifteen percent because of the operation of Wash.
24 Admin. Code § 388-106-130(b)(3) (or its predecessor), except to the extent that the
25 recipient-employers of such persons (3) requested an adjudicative proceeding pursuant to
26 Wash. Rev. Code § 74.08.080 challenging the downward adjustment and have received or
will receive back benefits as a result.

27 C07-5280RJB, Dkt. 47, at 8.

28 A class action may be appropriate if (1) the members of a class are so numerous that joinder
29 of all members is impracticable, (2) there are questions of law or fact common to the class; (3) the
30 claims or defenses of the representative parties are typical of the claims or defenses of the class,
31

1 and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R.
2 Civ. P. 23(a).

3 If the requirements of subdivision (a) are satisfied an action may be maintained as a class
4 action if:

5 (1) the prosecution of separate actions by or against individual members of the class would
6 create a risk of

7 (A) inconsistent or varying adjudications with respect to individual members of the
8 class which would establish incompatible standards of conduct for the party opposing
9 the class, or

10 (B) adjudications with respect to individual members of the class which would as a
11 practical matter be dispositive of the interests of the other members not parties to the
12 adjudications or substantially impair or impede their ability to protect their interests;
13 or

14 (2) the party opposing the class has acted or refused to act on grounds generally applicable to
15 the class, thereby making appropriate final injunctive relief or corresponding declaratory relief
16 with respect to the class as a whole; or

17 (3) the court finds that the questions of law or fact common to the members of the class
18 predominate over any questions affecting only individual members, and that a class action is
19 superior to other available methods for the fair and efficient adjudication of the controversy.
20 The matters pertinent to the findings include: (A) the interest of members of the class in
21 individually controlling the prosecution or defense of separate actions; (B) the extent and
22 nature of any litigation concerning the controversy already commenced by or against
23 members of the class; (C) the desirability or undesirability of concentrating the litigation of
24 the claims in the particular forum; (D) the difficulties likely to be encountered in the
25 management of a class action.

26 Fed. R. Civ. P. 23(b).

The Court agrees with the parties that class certification is appropriate. The size of the class
is approximately 11,000, making joinder not practicable. In addition, the Shared Living Rule and its
application to beneficiaries and/or caregivers are questions of law and fact common to the class or
classes. The claims of the beneficiaries and caregivers identified in the *Pfaff* and *Rekhter* complaints
appear to be typical of the claims of the class or classes. The identified beneficiaries and caregivers
appear to fairly and adequately protect the interests of the class. Accordingly, the requirements of
Fed.R.Civ.P. 23(a) have been met, at least for the liability stage.

1 The court next analyzes the factors under Fed.R.Civ.P. 23(b)(1) and (2). The *Pfaff* and
2 *Rekhter* complaints request declaratory and injunctive relief in addition to damages. If this case were
3 to proceed on a case by case basis, there may be a risk of inconsistent or varying adjudications with
4 respect to individual members of the class. Further, differing results in individual cases could pose a
5 risk of incompatible standards of conduct for defendants (even though defendants are not, strictly-
6 speaking, opposing the class). Adjudications with respect to individual members of the class would,
7 as a practical matter, be dispositive of the interests of the other members not parties to the
8 adjudications or could substantially impair or impede their ability to protect their interests. Finally,
9 defendants have applied the Shared Living rule, based upon an administrative rule that has been
10 generally applicable to the beneficiaries and caregivers, thereby making appropriate final injunctive
11 relief or corresponding declaratory relief with respect to the class as a whole.

12 Defendants oppose certification of the class(es) based upon Fed.R.Civ.P. 23(b)(3), which
13 would require certain notice and opt-out provisions. *See* Fed.R.Civ.P. 23(c). At this point,
14 certification of a class(es) appears to be appropriate for the liability stage of the proceedings.
15 Certification for purposes of damages is premature. Amounts due to plaintiffs, if any, will vary;
16 damages may be based on either federal law or state law, or both; and/or there may be an
17 administrative process for recovery of damages. It does not appear that certification under
18 Fed.R.Civ.P. 23(b)(3) is necessary or appropriate at this time.

19 Accordingly, plaintiffs have met the requirements under Fed.R.Civ.P. 23(a), and under
20 Fed.R.Civ.P. 23(b)(1) and (2) for class certification. The motions for class certification (Dkt. 37-2
21 and 45) should be granted insofar as classes should be certified for purposes of liability. Defendants'
22 definition of the classes is appropriately drawn, and the court should certify the classes proposed by
23 defendants.

2. Appointment of Interim Class Counsel

On October 25, 2007, *Pfaff* moved the Court to appoint her counsel as interim counsel representing a proposed class of Medicaid beneficiaries pursuant to Fed. R. Civ. P. 23(g). Dkt. 37. *Pfaff* is being represented by Sirianni Youtz Meier & Spoonemoore. *Pfaff* counsel does not seek to represent any proposed class of caregivers because “a conflict of interest exists between the proposed class of beneficiaries and that of caregivers.” *Id.*, at 4.

On October 25, 2007, the *Rekhter* plaintiffs moved the Court to appoint their counsel as interim counsel. Dkt. 41. The *Rekhter* plaintiffs are being represented by two firms: Livengood Fitzgerald & Alskog and Gordon Thomas Honeywell Peterson & Daheim. Gregory A. McBroom and Kevin B. Hansen have appeared on behalf of Livengood. Under the proposed structure, Livengood would be the lead firm and Gordon Thomas would be “providing assistance when necessary” in a consultation role. *Rekhter* counsel seeks to represent both beneficiaries and caregivers, and denies any conflict exists between the beneficiaries and caregivers.

Defendants recommend that the court appoint *Rekhter* counsel because they have indicated a willingness to represent both putative classes.

Fed.R.Civ.P. 23(g) sets forth the requirements for appointment of class counsel.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

Fed.R.Civ.P. 23(g)(1).

At this point, particularly for purposes of liability, it appears that only one law firm should represent the putative class. All three law firms appear qualified to adequately protect the interests of the classes. All counsel appear to have worked diligently to identify and investigate potential claims. Livengood appears particularly capable of representing the classes, because this law firm has been involved with the Shared Living Rule since 2004, and Mr. McBroom was lead counsel in *Jenkins*, the state case that invalidated the Shared Living rule. Livengood appears to be ready to commit the resources needed to represent the classes. The court has not been persuaded that both of the law firms appearing in *Rekhter* are required in order to address and manage the class action. Moreover, it is not appropriate to appoint *Pfaff* counsel to represent the classes certified by this order, since *Pfaff* counsel believe that there is an inherent conflict of interest between the beneficiaries and the caregivers. While a conflict of interest could potentially arise between beneficiaries and caregivers at the damages phase of this litigation, there does not appear to be a conflict of interest at the liability phase. The potential conflicts raised by *Pfaff* counsel are speculative and do not warrant separate counsel at this time. If conflicts of interest should later arise, counsel is bound the Rules of Professional Conduct, and should notify the court of the conflict.

Accordingly, the court should deny *Pfaff's* motion appoint *Pfaff* counsel as interim counsel (Dkt. 37) and grant in part *Rekhter's* motion to appoint *Rekhter* counsel as interim class counsel (Dkt. 41). The court should appoint Gregory A. McBroom and Kevin B. Hansen of Livengood Fitzgerald & Alskog as class counsel.

3. Defendants' Motion to Strike Declaration of John A. Strait

On November 1, 2007, Defendants moved the Court to strike John Strait's declaration, which was submitted by *Pfaff*. Dkt. 46. Defendants contend that the declaration constitutes improper purported expert testimony on a question of law.

An issue of particular concern to the court is whether there is a conflict of interest in this case between the beneficiaries and the caregivers. The declarations of Mr. Strait and David Boerner, both well qualified law professors, have been helpful to the court in examining the conflict of interest issue. The motion to strike the declaration of John Strait should be denied.

4. Hearing

The court has several concerns that should soon be addressed, before a case management schedule is adopted. Class counsel and defendants should be prepared to address the following issues at a hearing to be scheduled by the Clerk.

- Whether this Court is bound by the *Jenkins* decision.
- Whether there is an administrative process for beneficiaries or caregivers who wish to challenge the 15% reduction in benefits under the Shared Living rule. Is the Shared Living rule really an "irrebutable presumption"?
- Whether federal claims and/or all claims can be resolved by dispositive motions.
- Whether all payments by defendants are made to the account of a beneficiary, and if so, whether the caregivers have standing to pursue claims on their own behalf.
- Whether the potential conflict will require appointing separate counsel for a damages phase of the litigation.

- Whether defendants have an administrative mechanism in place to determine the damages issues. In other words, if defendants are found liable, do defendants have an administrative process to compensate both classes? If so, would the court need to address damages after liability is determined?
- Class counsel's proposals for limiting expenses of litigation.
- Whether a separate "settlement track" should be established at this time.
- The status of the state cases (*Jenkins v. Washington State Dept. Of Social and Health Services*, 160 Wn.2d 287 (2007); and *SEIU 775 v. Robin Arnold-Williams*, King County No. 07-2-17710-8SEA) and their relationship to this federal proceeding.

Prior to the hearing , the parties may brief the issues in writing, if they choose to do so.

Therefore, it is hereby

ORDERED that *Pfaff's* Motion for Certification of the Class of Medicaid Beneficiaries (C07-5280RJB, Dkt. 37-2) and *Rekhter's* Motion for Class Certification (C07-5280RJB, Dkt. 45) are **GRANTED** insofar as the following classes are **CERTIFIED** only for purposes of determining whether defendants are liable to plaintiffs. The class definition will include beneficiaries and caregivers, less those who have already been compensated, as follows:

1. All persons who (1) were determined eligible for Medicaid funded in-home personal care assistance and (2) had their base hours adjusted by fifteen percent because of the operation of Wash. Admin. Code § 388-106-130(b)(3) (or its predecessor), except to the extent that they (3) requested an adjudicative proceeding pursuant to Wash. Rev. Code § 74.08.080 challenging the downward adjustment and have received or will receive back benefits as a result.
2. All providers of Medicaid-funded in-home personal care employed by persons who (1) were determined eligible for Medicaid funded in-home personal care assistance and (2) had their base hours adjusted by fifteen percent because of the operation of Wash. Admin. Code § 388-106-130(b)(3) (or its predecessor), except to the extent that they (3) requested an adjudicative proceeding pursuant to Wash. Rev. Code § 74.08.080 challenging the downward adjustment and have received or will receive back benefits as a result.

Pfaff's Motion for Appointment of Interim Counsel for Proposed Class of Medicaid Beneficiaries (C07-5280RJB, Dkt. 37) is **DENIED**. *Rekhter's* Motion for Appointment of Interim Class Counsel,

1 (C07-5280RJB, Dkt. 41) is **GRANTED IN PART**, and Gregory A. McBroom and Kevin B. Hansen
2 of Livengood Fitzgerald & Alskog are **APPOINTED** as class counsel. Defendants' Motion to
3 Strike Declaration of John A. Strait (C07-5280RJB, Dkt. 46) is **DENIED**.

4 The Clerk is directed to send uncertified copies of this Order to all counsel of record and to
5 any party appearing *pro se* at said party's last known address. The Clerk is further directed to
6 schedule oral argument on the matters identified above, as soon as the court's schedule permits.

7 DATED this 27th day of November, 2007.

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9 
10 ROBERT J. BRYAN
11 United States District Judge
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